

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BGH HOLDINGS, LLC, a Washington  
limited liability company; GINGER  
ATHERTON; HENRY DEAN, and  
their marital community,

Plaintiff,

v.

DL EVANS BANK,

Defendant,

v.

FRANK DEAN, JIM DEAN and WN3,  
LLC,

Additional Parties.

CASE NO. 2:18-cv-01408-RSL

**AGREEMENT  
REGARDING  
DISCOVERY OF  
ELECTRONICALLY  
STORED  
INFORMATION AND  
~~PROPOSED~~ ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter:

**A. General Principles**

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in

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1 each case when formulating a discovery plan. To further the application of the proportionality  
2 standard in discovery, requests for production of ESI and related responses should be reasonably  
3 targeted, clear, and as specific as possible.

4 **B. ESI Disclosures**

5 Within 30 days after entry of this Order, each party shall disclose:

6 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,  
7 custody or control. The custodians shall be identified by name, title, connection to the instant  
8 litigation, and the type of the information under his/her control.

9 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,  
10 servers, etc.), if any, likely to contain discoverable ESI.

11 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain  
12 discoverable ESI (e.g. third-party email and/or mobile device providers, "cloud" storage, etc.)  
13 and, for each such source, the extent to which a party is (or is not) able to preserve information  
14 stored in the third-party data source.

15 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
16 (by type, date, custodian, electronic system or other criteria sufficient to specifically  
17 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.  
18 P. 26(b)(2)(B). Section (C)(3)(a)-(h) below sets forth data sources and ESI which are  
19 not required to be preserved by the parties. Those data sources and ESI do not need to be  
20 included on this list.

21 **C. Preservation of ESI**

22 The parties acknowledge that they have a common law obligation to take reasonable and  
23 proportional steps to preserve discoverable information in the party's possession, custody or  
24 control. With respect to preservation of ESI, the parties agree as follows:

25 1. Absent a showing of good cause by the requesting party, the parties shall not be  
26 required to modify the procedures used by them in the ordinary course of business to back-up

1 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
2 possession, custody or control.

3 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with  
4 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that  
5 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-  
6 (2) below).

7 3. Absent a showing of good cause by the requesting party, the following categories of  
8 ESI need not be preserved:

- 9 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 10 b. Random access memory (RAM), temporary files, or other ephemeral data  
11 that are difficult to preserve without disabling the operating system.
- 12 c. On-line access data such as temporary internet files, history, cache, cookies, and  
13 the like.
- 14 d. Data in metadata fields that are frequently updated automatically, such as last-  
15 opened dates (see also Section (E)(5)).
- 16 e. Back-up data that are substantially duplicative of data that are more  
17 accessible elsewhere.
- 18 f. Server, system or network logs.
- 19 g. Data remaining from systems no longer in use that is unintelligible on the systems  
20 in use.
- 21 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from  
22 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided  
23 that a copy of all such electronic data is routinely saved elsewhere (such as on a  
24 server, laptop, desktop computer, or "cloud" storage).

25 The parties should confer regarding any other categories of ESI that may not need to be preserved,  
26 such as text messages and social media data, in light of the General Principles set forth above, and  
determine whether they can agree that such categories can be added to the non-preservation list.

#### 23 **D. Privilege**

24 The parties should confer regarding the nature and scope of privilege logs for the case, including  
25 whether categories of information may be excluded from any logging requirements and whether  
26 alternatives to document-by-document logs can be exchanged.

1 1. With respect to privileged or work-product information generated after the filing of the  
2 complaint, parties are not required to include any such information in privilege logs.

3 2. Activities undertaken in compliance with the duty to preserve information are protected  
4 from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

5 3. Information produced in discovery that is protected as privileged or work product shall  
6 be immediately returned to the producing party, and its production shall not constitute a waiver  
7 of such protection, if: (i) such information appears on its face to have been inadvertently produced  
8 or (ii) the producing party provides notice within 15 days of discovery by the producing  
9 party of the inadvertent production.

10 4. **Privilege Log Based on Metadata.** The parties agree that privilege logs shall include  
11 a unique identification number for each document and the basis for the claim (attorney-client  
12 privileged or work-product protection). For ESI, the privilege log may be generated using  
13 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title  
14 and date created. Should the available metadata provide insufficient information for the purpose  
15 of evaluating the privilege claim asserted, the producing party shall include such additional  
16 information as required by the Federal Rules of Civil Procedure.

17 **E. ESI Discovery Procedures**

18 1. On-site inspection of electronic media. Such an inspection shall not be permitted  
19 absent a demonstration by the requesting party of specific need and good cause or by agreement  
20 of the parties.

21 2. Search methodology. The Court presumes that in the majority of cases, the use of  
22 search terms will be reasonably necessary to locate or filter ESI likely to contain discoverable  
23 information. The parties shall timely attempt to reach agreement on appropriate search terms, or  
24 an appropriate computer- or technology-aided methodology, before any such effort is undertaken.  
25 The parties shall continue to cooperate in revising the appropriateness of the search terms or  
26 computer- or technology-aided methodology.

1 In the absence of agreement on appropriate search terms, or an appropriate computer- or  
2 technology-aided methodology, the following procedures shall apply:

3 a. A producing party shall disclose the search terms or queries, if any, and  
4 methodology that it proposes to use to locate ESI likely to contain discoverable information. The  
5 parties shall meet and confer to attempt to reach an agreement on the producing party's search  
6 terms and/or other methodology.

7 b. If search terms or queries are used to locate ESI likely to contain  
8 discoverable information, a requesting party is entitled to no more than 5 additional terms or  
9 queries to be used in connection with further electronic searches absent a showing of good cause  
10 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the  
11 requesting party within 14 days of receipt of the producing party's production.

12 c. Focused terms and queries should be employed; broad terms or queries,  
13 such as product and company names, generally should be avoided. Absent a showing of good  
14 cause, each search term or query returning more than 250 megabytes of data is presumed to be  
15 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file  
16 types.

17 d. The producing party shall search both non-custodial data sources and ESI  
18 maintained by the custodians identified above.

19 3. Format. The parties agree that ESI will be produced to the requesting party with  
20 searchable text, in a format to be decided between the parties. Acceptable formats include, but are  
21 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),  
22 single-page TIFFs (only with load files for e-discovery software that includes metadata fields  
23 identifying natural document breaks and also includes companion OCR and/or extracted text  
24 files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily  
25 converted to image format, such as spreadsheet, database and drawing files, should be produced  
26 in native format.

1           4.     De-duplication.   The parties may de-duplicate their ESI production across  
2 custodial and non-custodial data sources after disclosure to the requesting party.

3           5.     Metadata fields. If the requesting party seeks metadata, the parties agree that only  
4 the following metadata fields need be produced: document type; custodian and duplicate  
5 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file  
6 path; date and time created, sent, modified and/or received; and hash value.

7  
8 DATED:   October 18, 2019.

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17  
18 **ORDER**

19 Based on the foregoing, IT IS SO ORDERED.

20 DATED: Oct. 30, 2019  
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23   
24 The Honorable Robert S. Lasnik  
UNITED STATES DISTRICT JUDGE

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